(1)

91-2085

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GENEVIEVE L. DUNN

Petitioner

v.

AMY ANNE MARCO

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHEN FEDERAL JURISDICTION IS BASED SOLELY ON DIVERSITY JURISDICTION, MUST THE FEDERAL COURTS FOLLOW STATE LAW?

2. IN THIS AUTOMOBILE ACCIDENT CASE WHERE FEDERAL JURISDICTION RESTS SOLELY ON DIVERSITY SHOULD THE PLAINTIFF AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED BE PERMITTED TO AMEND HER COMPLAINT TO CORRECT A MISNOMER CAUSED BY A TYPOGRAPHICAL TRANSPOSITION FROM A POLICE REPORT i.e. ANNE F. MARCO TO AMY ANNE MARCO WHERE THE LAW OF THE COMMONWEALTH OF PENNSYLVANIA WOULD SO PERMIT?

3. UNDER F.R.C.P. NO. 15 SHOULD THE

PLAINTIFF BE PERMITTED AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED TO AMEND HER COMPLAINT TO CORRECT A MISNOMER?

4. WHEN PRIOR DECISIONS OF BOTH THE DISTRICT COURT AND THE COURT OF APPEALS HAD PERMITTED PLAINTIFFS TO AMEND THEIR COMPLAINTS SHOULD THE PLAINTIFF IN THIS CASE BE PERMITTED TO AMEND HER COMPLAINT?

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REFERENCE TO REPORTS OF DECISION BELOW

The United States Court of Appeals for the Third Circuit affirmed without opinion. The United States District Court for the Western District of Pennsylvania did not issue an opinion but adopted the recommendation of the Magistrate Judge as its opinion. Although no opinion was published copies of the foregoing are set forth verbatim in the Appendix.

The June 28, 1992 decision of the United States District Court for the Western District of Pennsylvania granting the Defendant's F.R.C.P. No. 12(b) Motion because of a typographical error that transposed the Defendant's middle name to be her first name and her father's middle initial to be her middle initial and dismissing Plaintiff's case is the judgment sought to be reviewed.

On February 26, 1992, the United States Court of Appeals for the Third Circuit denied Plaintiff's petition for a rehearing.

Your Honorable Court has jurisdiction to review the aforesaid judgment pursuant to 28 U.S.C. 1254(1) based on a diversity of citizenship between an Ohio resident Plaintiff and a

Pennsylvania resident Defendant for a May 8, 1988 automobile accident that occurred in Indiana County, Pennsylvania. That statute provides that:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

The accident that gave rise to the within action occurred on May 8, 1988. The Plaintiff commenced suit on May 3, 1990 and provided a courtesy copy of the complaint to the Defendant's insurance

company because Plaintiff's counsel had been dealing with the Defendant's carrier since shortly after the accident. The Plaintiff made two attempts to serve the Defendant by mail with the first attempt on May 14, 1990. Defense counsel entered their appearance on May 17, 1990. On July 24, 1990, the Defendant filed a 12(b) motion to dismiss Plaintiff's case because of lack of jurisdiction over the defendant. The Plaintiff amended her complaint to reflect the correct name of the Defendant and attempted personal service on the Defendant at the Defendant's address listed on the police report by a private investigator. The Defendant's father informed the private investigator that the Defendant had married and moved but refused to divulge

her married name or address. When the private investigator left the complaint with the Defendant's father, the Defendant's father flung the complaint back at the private investigator.

The Magistrate Judge failed to follow the law of the Commonwealth of Pennsylvania, prior cases of the District Court, the Third Circuit, and recommended dismissal of Plaintiff's case because the amendment to correct the first name and middle initial did not relate back under F.R.C.P. 15 to the timely filed complaint. The District Judge adopted the Magistrate Judge's recommendation and dismissed Plaintiff's case.

The District Court dismissed the Plaintiff's case solely on the basis of Plaintiff's counsel's typographical transposition error that occurred in

preparing the complaint from the police accident report. On the police report the driver's name, Amy Anne Marco, appeared on one line. The vehicle owner's name, William F. Marco, appeared on the line directly beneath the driver's line. In preparing the complaint, the Defendant's middle name was transposed to be her first name and the owner's middle initial was transposed to be the Defendant's middle initial. In all other aspects the complaint was correct.

With respect to the named Defendant, there is no such person as Anne F. Marco. Although the Magistrate Judge found that:

> the naming of Anne F. Marco as the defendant is a misnomer and not a mistake regarding a defendant's

identity,

he nevertheless recommended dismissal of Plaintiff's case.

There was absolutely no prejudice to the Defendant because Plaintiff's counsel had provided the Defendant's carrier with a courtesy copy of the complaint and her insurance company retained counsel who entered their appearance on her behalf fourteen days after the Plaintiff filed her complaint.

The Defendant's counsel contacted the Defendant within approximately thirty days of their entry of appearance. The Defendant and her insurance carrier both admitted that there was no substantive prejudice because the Defendant remembered the facts of the accident and the insurance company had completed their

investigation in October of 1988 when it settled with the driver of the vehicle in which the Plaintiff was a passenger.

The only procedural difference was that instead of the insured receiving the complaint and providing it to the insurance company, the insurance company received it first and verified the details of the complaint with the insured.

In Indiana County, Pennsylvania, on May 8, 1988, the Defendant Amy Anne Marco, a Pennsylvania resident, ran her automobile into the rear of a vehicle waiting with its turn signal on to make a left hand turn into the parking lot of a convenience store. The accident injured the Plaintiff, Genevieve L. Dunn, an Ohio resident who was a passenger in the vehicle waiting to make the turn.

Marco's father, William F. Marco, owned the Marco vehicle.

The investigating police department investigated the accident and prepared an investigation report.

Shortly after the accident, Dunn retained the undersigned as her counsel. Marco's insurance company contacted Dunn shortly after the accident. Dunn referred the Kemper adjuster to her attorney. The adjuster and attorney exchanged letters and information until defense counsel entered their appearance after Dunn commenced suit on May 3, 1990.

By October of 1988, Kemper had completed its investigation of the accident, settled both the personal injury claim of the driver and the driver's employer's property damage

claim. In order to complete its investigation and settle the other portions of the case, Kemper had obtained the police report, taken the statements of Marco and the driver of the Dunn vehicle and received an appraisal of the property damage. Kemper paid 100% of the property damage claim and settled the personal injury claim of the driver of the Dunn vehicle on October 24, 1988.

The only open matter in Kemper's file was Dunn's claim. Dunn suffered severe and debilitating injuries to her back, neck and jaw. She has and is undergoing medical treatment that included a month as an inpatient at the Cleveland Pain Clinic at the University of Ohio in Cleveland, Ohio.

From shortly after the accident until defense counsel entered their

appearance, Kemper's adjuster remained in contact with Dunn's attorney who provided Kemper with updated status reports on Dunn's condition.

On May 3, 1990, Dunn commenced suit against Marco. In preparation of the complaint, a transposition error occurred. In either dictation or transcription from the police report, the complaint picked up Marco's middle name as her first name and her father's middle initial F. as her middle initial from the line beneath her name on the police report. There is no such person as Anne F. Marco. Except for the transposition typographical error, all other aspects of the complaint are accurate.

As a matter of courtesy, Dunn's counsel sent a copy of the complaint to

Kemper's adjuster responsible for the file which the adjuster received on May 15, 1990. Dunn's counsel also made two unsuccessful attempts on May 10, 1990 and May 14, 1990 to serve Marco by mail.

The Kemper adjuster assigned the case to Marco's present counsel. Marco's counsel by letter of May 15, 1990 informed Dunn's counsel of his entry of appearance and obtained a courtesy extension of time to file a "responsive pleading". On May 17, 1990, he entered his appearance of record. After Marco's counsel entered his appearance, Dunn's counsel made no further attempt to serve Marco until after Marco's counsel filed his 12(b) motion, because Rule Of Professional Conduct 4.2 prohibits contact with a party represented by counsel. Marco's counsel subsequently

served discovery on Dunn. Dunn's counsel, who, at that time, was a sole practitioner, obtained an extension to answer the discovery from Marco's counsel for the month of July, 1990 because he would be in China. Although Kemper in the middle of June had instructed Marco's counsel to attack the typographical error and Marco's counsel was aware Dunn's counsel would be out of the office in July, Marco's counsel did not notify Dunn's counsel that he would file a 12(b) motion and waited until July when Dunn's counsel was in China to file the motion.

When Dunn's counsel returned from China, he amended the complaint to correct the typographical error and attempted personal service within the 120-day service period on Marco at the address listed on the police report.

Marco's father informed the process server that Marco had married and moved but refused to provide the process server with either her married name or address and threw the complaint back at the process server.

Dunn's counsel also filed a motion to extend the time of service and an alternative motion to amend the complaint. Marco has not filed any 12(b) motion or otherwise attacked the amended complaint.

Depositions of Marco, Marco's parents, Kemper personnel and Dunn's counsel were taken.

Marco testified that "the week or so after the accident" she gave a recorded statement to her insurance company. (151 a) Marco testified that "toward the end

of July in 1990" her mother called and gave her defense counsel's name, phone number and asked her to call him (152 a). Marco testified that she had no problem remembering the facts of the accident, remembered running into the rear of the Dunn vehicle and agreed that she "could testify to that today or next year as well as she could the day of the accident." (162 a). Marco testified that her father had related that he refused to accept the complaint and asked her to call her lawyer. The following colloquy sets forth her counsel's instructions and inquiry:

What did he tell you?

He said it was not delivered to me specifically and that I didn't

have to worry about it, that particular paper and that my father wasn't wrong in not accepting it.

What else did he tell you about this case, what other conversations have you had with him?

The first time he told me I was being sued and who was suing me and what it was for and if I was that person and I said yes, and he said he would get in contact with me further through letters. . . . (163 a)

Jeffrey Diamond, the adjuster handling the case, testified that Kemper had taken recorded statements from Marco

on May 16, 1988 and the driver of Dunn's vehicle on May 18, 1988. (178 a). On May 24, 1988, Kemper received a copy of the police report (181 a) and on the same day had written to Dunn (190 a). The adjuster had retained the actual tape of both recordings in the file. (178 a). Kemper settled the personal injury claim of Dunn's driver on October 24, 1988. (180 a). The Kemper adjuster testified that shortly after the May 24, 1988 letter to Dunn, Kemper received notice of representation from Dunn's counsel. (199 a). The adjuster testified that he did not pick up the different name and middle initial but his superior did. (208 a). With respect to the proper party the following colloquy establishes his understanding:

As far as you were concerned, you knew who was being sued and what she was being sued for, is that correct?

Yes. (209 a).

Kemper's supervisor admitted that she initially thought Marco was sued until she picked up the different first name and middle initial. (239 a). She admitted that it was the same Plaintiff, date of accident and that:

except for the `Anne F.' instead of the `Amy Anne', it was the same accident you had, correct?

Yes. (240 a).

The following colloquy establishes her understanding of the typographical error:

> Since it was for the same accident, the same plaintiff, what did you assume happened?
>
> Well, one of two things, either we didn't have the name right to begin with or you had the name wrong.
>
> Which would have been a typographical error on either your side or mine, correct?
>
> Yes, that's correct. (240 a - 241 a).

Kemper's policy with respect to

coverage questions in general and this case in particular appears in the following colloquy:

> If you don't have coverage, do you send a no coverage letter?
>
> No, if its not our file, we would just send it to whoever should have it."
>
> If you enter an appearance for a party and you subsequently determine there is a question of coverage, do you send out a reservation of rights letter?
>
> If there is a question of coverage, yes. I don't think we have ever said there is a question of

coverage here.

So you admit that you have coverage for this claim?

Yes, we never questioned coverage on this claim. (241 a - 242 a).

The Defendant has never contended that the misnomer in any way prejudiced Marco in her defense. The Defendant's 12(b) motion was solely on the technical basis of the typographical error except for other matters not involved in this appeal.

The Magistrate Judge in his initial opinion stated that:

Plaintiff asserts and it is

> painfully obvious in this case, that the naming of Anne F. Marco as defendant is a misnomer and not a mistake regarding the defendant's identity. (Page 3).(emphasis added).

The Defendant rested her motion to dismiss on Schiavone v. Fortune, 750 F.2d 15,17 (3rd. Cir. 1984), aff'd 477 U.S. 21 (1986).

Dunn relied on Walker v. Armco Steel Corporation, 446 U.S. 740, 100 S. Ct. 1978, 64 L.Ed. 659 (1980) and Ragan v. Merchants' Transfer and Merchants' Warehouse Company, 337 U.S. 530, 69 S. Ct. 1233, 93 L.Ed. 1520 (1949) for the proposition that where federal jurisdiction rests solely on diversity of citizenship that the result of the

litigation should be the same in federal court as if the case had been tried in state court "so far as legal rules determine the outcome."

Dunn distinguishes Schiavone on the basis that it was not a Walker case because the Plaintiff's counsel in Schiavone before the district court agreed that New Jersey rules were procedural only. However, the United States Court of Appeals for the Third Circuit held Schiavone to that concession and decided the case as if it were a pure federal case and not a diversity case.

The Magistrate Judge, despite his acknowledgement that state law governed in diversity cases and that Schiavone was a pure federal case because of Schiavone's counsel's concession,

nevertheless recommended dismissal of the Plaintiff's case. The District Judge adopted the Magistrate Judge's recommendation and entered an order dismissing Plaintiff's case. The Third Circuit, without opinion, affirmed the district court's decision and denied rehearing.

At each level of the federal system, the decision in this case is contrary to prior reported decisions of the courts.

At the district court level, the decision in this case is directly contrary to the decision of the same court in Beyda v. U.S. Air, Inc., 697 F. Supp. 1394 (W.D. Pa. 1988). In Beyda, the court permitted the amendment after the expiration of the statute of limitations with relation back to the timely filed complaint to permit

amendment from David Foster to Dewey DeWitt Foster.

At the Third Circuit level, the decision in this case is directly contrary to the Court's own decision in Dandrea v. Malsbary Manufacturing Co., 839 F.2d. 163 (3rd. Cir. 1988) where the Court permitted amendment of the corporation's name after the statute of limitations had expired with relation back.

Ironically, the Magistrate Judge noted the conflict between the decision in this case and the Beyda and Dandrea decisions in contrast to Schiavone holding that:

> Dandrea... (changing the name of a corporation to reflect its new name is not changing a party for the

purpose of Rule 15(c)), and Beyda... (changing caption to reflect a defendant's true first and middle names is not changing a party for purposes of Rule 15(c)).

Regrettably, neither the District Court nor the Third Circuit ever dealt with the conflict the Magistrate Judge recognized.

The statute granting jurisdiction of this case to the United States District Court for the Western District of Pennsylvania is 28 U.S.C. 1332 (a)(1). That statute provides that:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in

controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between-

(1) citizens of different States....

The United States Court of Appeals for the Third Circuit's decision is directly contrary to the decision of Your Honorable Court in Walker v. Armco Steel Corporation and Ragan v. Merchants Transfer and Merchants' Warehouse Company because it failed to apply the law of the Commonwealth of Pennsylvania to the within case.

The Court of Appeals failed to follow Walker v. Armco Steel Corporation and Ragan v. Merchants' Transfer and Merchants' Warehouse Company and misapplied Schiavone to the within case.

Schiavone does not apply to this case because Schiavone's counsel's concession made that case into a pure federal case and not a diversity case. This is a diversity action subject to Walker and Ragan, not Schiavone.

The Court of Appeals' decision in this case is directly contrary to its own decision in Dandrea and the decision of the district court in Beyda.

In addition to conflict with Your Honorable Court's decisions and the decisions of the Court of Appeals in Dandrea and the District Court's decision in Beyda, there is the ultimate issue of justice. If the end of all procedural rules and substantive law is justice, there is absolutely no reason that the Plaintiff's case should be dismissed

because of the typographical error that did not prejudice the defendant. Everyone who has been involved in this case knows and recognizes that the Magistrate Judge was correct when he characterized the typographical error as a misnomer not a mistake in the identity of the party sued. The decision of the Court of Appeals should be reversed.

In the Magistrate Judge's recommendation, he paid lip service to Walker and Ragan but failed to follow those decisions and recommended dismissal of the Plaintiff's complaint. Further, the Magistrate Judge noted that the Third Circuit's decision in Dandrea and the Western District Courts' own decision in Beyda were contrary to his recommendation but still recommended dismissal without

discussing or attempting to distinguish Dandrea and Beyda from the instant case.

The Magistrate Judge's recommendation recognized that Schiavone was not a diversity case because Schiavone's counsel had made the fatal concession in the District Court that New Jersey's rules were procedural and not substantive. Nevertheless, he relied on Schiavone to support his dismissal recommendation.

The Magistrate Judge's rationale was:

1. Ragan and Walker require application of state law;
2. Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 8 (1965) is still good law if there is not

conflict between federal and state law;

3. If there is not conflict between state and federal law than the federal rules of civil procedure apply;
4. Saracina v. Cotoia, 417 Pa. 80, 208 A.2d 746 (1965) refused to permit amendment with relation back where the Plaintiff had sued the father rather than the son and therefore Pennsylvania law would also not permit amendment in this case thereby removing any conflict between Pennsylvania law and federal rules;
5. Application of F.R.C.P.15(c) prohibits amendment with relation back in this case;
6. No amendment with relation back is

permitted therefore this case should be dismissed.

The Magistrate Judge's recommendation ultimately rests on Pennsylvania's law on amendment with relation back. On Pennsylvania law, the Magistrate Judge is simply wrong and the case he cited, i.e., Saracina, does not support his recommendation.

The only Pennsylvania case that the Magistrate Judge cited was Saracina which the Magistrate Judge describes as "the seminal case in this area." Saracina does not support dismissal of this case and it clearly is not the seminal case. In Saracina, the Plaintiff's complaint listed the defendant as Anthony Cotoia, a minor, that Anthony Cotoia owned and

operated a motor vehicle, that the Plaintiff was crossing the street when the defendant's vehicle struck the Plaintiff and that the accident occurred on April 4, 1961. Anthony Cotoia in his answer denied that he was a minor, admitted that he owned the vehicle but that it was his son Robert that was driving the vehicle and that he did not exercise any control or supervision over the vehicle's operation. The Plaintiff moved to amend the complaint to name Robert rather than Anthony as the Defendant, aver that Robert was the operator, that the Plaintiff was standing in the street not crossing it and that the accident occurred on April 7, 1961 rather than April 4, 1961. The court affirmed denial of the motion to change the defendant from the father Anthony

Cotoia to the son Robert Cotoia because it would have added a new and distinct party. Saracina citing Girardi v. Laquin Lumber Co., 232 Pa. 1, 81 A. 63 (1911) set forth the standard for amendment with relation back as:

> If the effect of the amendment is to correct the name under which the right party is sued, it will be allowed, if it is to bring in a new party, it will be refused. 417 Pa. at footnote 5, Page 83. (emphasis in original)

In Saracina, the court distinguished Wright v. Eureka Tempered Copper Company, 206 Pa. 274, 55 A. 978 (1903) on the same basis the Third Circuit utilized in

rendering the decision in Dandrea. The Court held that:

> In Wright, the Eureka Tempered Copper Works succeeded to the business of the Eureka Tempered Copper Company. A suit was commenced against the copper works and it was discovered after the statute of limitations had run, that the new corporation bore a slightly different name. Since the intended party was in court, the manager of the copper works having been served, and the effect of the amendment was merely to change the incorrect designation to the correct defendant, the amendment was allowed. 417 Pa. at 84.

The Magistrate Judge misapplied Saracina and Pennsylvania law because Saracina supports the Plaintiff's position in this case that amendment with relation back should be permitted.

The most recent and most thorough explication of Pennsylvania law appears in a four page discussion and holding in Thomas v. Duquesne Light Company, 376 Pa. Super 1, 5-89, 545 A.2d 289 (1988). In Thomas, the Plaintiff commenced suit on October 7, 1983 before the statute of limitations expired against Mae Lunardi as proprietor of a beer distributorship. Lunardi filed an answer denying that she was the proprietor of the distributorship, that a corporation named Dario's Beer Distributors was the owner of the business and that she was the president of the corporation. Despite

the answer, the Plaintiff did nothing until September 29, 1986 after they presented their entire case at trial and orally requested to amend their complaint. The trial judge denied the Plaintiff's request on the basis that the amendment would add a new party after the statute of limitations had expired. The Superior Court reversed citing from Girardi the quote the Saracina court cited holding that:

> If the effect of the amendment is to correct the name under which the right party is sued, it will be allowed; if it is to bring in a new party, it will be refused. 376 Pa. Super at 6.

The Court also cited Hoare v. Bell Telephone Company of Pennsylvania, 509 Pa. 57, 500 A.2d 1112 (1985) and Jozdonovic v. Pleasant Hills Realty, 357 Pa. 23, 53 A.2d 73, (1947) following the Girardi citation. The Court discussed at length two Pennsylvania Supreme Court cases, Paulish v. Bakaitis, 442 Pa. 434,275 A.2d 318 (1971) and Powell v. Sutliff, 410 Pa. 436, 189 A.2d 864 (1963) that permitted amendment after the statute of limitations expired from individual to corporation and from corporation to individual. The Court in Thomas concluded that:

> The amendment to correct the designation of the defendant beer distributor would not have added a new party. Dario's Beer

Distributors was the party served, and it cannot escape accountability merely because it was initially designated as a sole proprietorship instead of a corporation. As the Supreme Court observed in Waugh v. Steelton Taxicab Co., supra, 371 Pa. at 438, 89 A.2d at 528:

> It would be strange indeed if the law would permit a person actually responsible for a civil or criminal act to escape accountability because the summons or warrant served on him named him Richard Roe instead of John Doe.

The Magistrate Judge's

interpretation of Pennsylvania law is simply wrong. At least since the Girardi decision in 1911, Pennsylvania would permit the amendment with relation back in this case. Consequently, under any analysis there is a conflict with Pennsylvania law and F.R.C.P. 15 and Pennsylvania law must prevail, Walker, Ragan, Hanna.

In addition to the foregoing analysis, the Magistrate Judge was wrong under Dandrea and Beyda. Beyda is directly on point with this case, in Beyda the court held that:

> Pennsylvania has a one year limitations period for defamation actions. 42 Pa.C.S. A. Section 5523 (1). Defendant Foster prepared his Line Pilot Report

concerning the jumpseat incident on October 15, 1985. The original Complaint in this action was filed in Common Pleas Court on October 15, 1986, but it named as a defendant David Foster. Plaintiff did not serve defendant Dewey DeWitt Foster until February 17, 1987, and the Complaint was amended April 3, 1987 to correct the name of the defendant.

Defendant Foster contends that the Complaint is untimely filed as to him because he was not the person sued in the original Complaint filed on the last day of the one year limitations period. We think this is merely a case of correcting a misnomer, and under the first

sentence of Fed.R.Civ.P. 15(c), the amendment will relate back to the original Complaint. See Wright & Miller, Fed. Practice and Procedure Section 1498; and e.g., Malmrose v. Estate of F.G. Aljoe, 92 F.R.D. 490 (W.D.Pa. 1981); Boatman v. Thomas, 320 F. Supp. 1079 (M.D. Pa. 1972). Because the amendment merely corrects a misnomer and does not in fact change parties, and because the original Complaint was timely served and no prejudice has been demonstrated, the amendment relates back and plaintiff's claims against Foster are timely.

If the District Court granted the amendment with relationship back from

"David to Dewey DeWitt", it should have permitted the amendment with relationship back in this case.

In this action, the Court knew that the Plaintiff sued the Defendant Amy Anne Marco and not the non-existent Anne F. Marco. The Magistrate Judge held that:

> "It is painfully obvious in this case that the naming of Anne F. Marco as the defendant is a misnomer and not a mistake regarding a defendant's identity." (Page 300a) (Emphasis added)

Comparison of the Magistrate Judge's holding makes the District Court's decision in this case irreconcilable with Beyda. In Beyda, the holding was:

> "We think this is merely a case of correcting a misnomer, and under the first sentence of Federal Rules of Civil Procedure 15(c), the amendment will relate back to the original complaint." (Emphasis added)

If it was painfully obvious that it was a misnomer then Plaintiff should have been allowed to amend the complaint with relation back. No one is prejudiced by the amendment. The Thomas Court's conclusion permitting the amendment is equally applicable here. The Defendant cannot escape accountability merely because [she] was initially designated as "Anne F. Marco" rather than "Amy Anne Marco."

David W. Knauer

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APPENDIX

United States Court of Appeals for the Third Circuit -

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-3455

GENEVIEVE L. DUNN,
Appellant

v.

AMY ANNE MARCO

(D.C. Civ. No. 90-00753)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO and ROTH, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

_____

Circuit Judge

Dated: February 26, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-3455

GENEVIEVE L. DUNN,
Appellant

v.

AMY ANNE MARCO

Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Civil Action No. 90-00753
(Honorable Alan N. Bloch)

Argued January 23, 1992

Before: STAPLETON, SCIRICA, and ALITO,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions

raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

_____

Circuit Judge

Attest:

_____

Sally Mrvos, Clerk
January 31, 1992

Certified as a true copy and issued in lieu of a formal mandate on March 5, 1992.

Attest:

Clerk, U.S. Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GENEVIEVE L. DUNN,	
Plaintiff	
v.:	Civil Action No.90-753
	JUDGE ALAN N. BLOCH
ANNE F. MARCO,	MAGISTRATE JUDGE
Defendant	BENSON

MEMORANDUM ORDER

On May 7, 1990, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. Section 636 (b)(1) (A) and (B), and Rules 3 and 4 of the Local Rules for

Magistrates.

The magistrate judge's report and recommendation, filed on June 4, 1991, recommended that defendant's motion to dismiss be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all counsel by first-class mail on June 4, 1991. Objections were filed by plain-tiff on June 14, 1992. On June 24, 1991, defendant filed a reply to plaintiff's objections. After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 27th day of June, 1991;

IT IS HEREBY ORDERED that defendant's motion to dismiss is granted.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated June 4, 1991, is adopted as the opinion of the court.

ALAN N. BLOCH
UNITED STATES DISTRICT JUDGE

cc: Honorable Kenneth J. Benson
United States Magistrate Judge

David W. Knauer, Esquire
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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GENEVIEVE L. DUNN,	
Plaintiff	)
	)
v.:	)Civil Action No.90-753
	)JUDGE ALAN N. BLOCH
ANNE F. MARCO, :	)MAGISTRATE JUDGE
Defendant	)BENSON :

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that defendant's motion to dismiss this action be granted since suit was not brought against the proper party within the

limitations period, and an amendment of the complaint to reflect the defendant's true name would not relate back so as to avoid the bar of the statute.

II. REPORT

This is a diversity action commenced by an Ohio resident against a resident of Pennsylvania for damages arising out of an automobile accident which occurred on May 8, 1988. The accident involved the Plaintiff, Genevieve Dunn, and Amy Anne Marco. The complaint, however, was filed on May 3, 1990, against "Anne F. Marco." Plaintiff attempted service on May 14, 1990, on "Anne F. Marco" at her parents' home, the address provided by Amy Anne Marco in the police report of the accident, but service was refused.

Service was also refused on May 24, 1990, at the same address, to "Miss Ann Marco." A motion to dismiss has been filed on behalf of Anne F. Marco on the basis that proper service has not been effectuated. Dunn has now requested permission to file an amended complaint naming Amy Anne Marco as the proper party, and asserting that the original complaint contained a mistake regarding the defendant's name. Defendant's counsel, although nominally representing Anne F. Marco, is, for purposes of this motion to dismiss, representing Amy Anne Marco and asserts that she may not now be served with process because the statute of limitations has run. [1]

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[1]. The parties agree that the applicable statute of limitations is two years from the date of

The issue presented by the facts of this case is whether plaintiff should be permitted at this time to amend the complaint to reflect defendant's true name, and whether that amendment should "relate back" under F.R.C.P. 15(c) to the filing of the complaint. If the amendment is permitted, but does not relate back to the May 3, 1990 filing of the complaint, then the action against Amy Anne Marco will be time-barred.

As a general matter, a ruling on a motion to amend pleadings is left to the sound discretion of the district court, Coventry v. U.S. Steel Corp., 856 F.2d 514 (3d Cir. 1988), and such leave should be freely given when justice so requires. Howze v. Jones & Laughlin Steel Corp, 750 F.2d 1208 (3d Cir. 1984).

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occurrence, or until May 8, 1990.

The resolution of the specific issue in this case, however, is dependent upon the application of the test set forth in Rule 15(c):

> **(c) Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the

party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Plaintiff asserts that the naming of Anne F. Marco as defendant is a misnomer, and not a mistake regarding the defendant's identity. Plaintiff therefore asserts that the test set forth in the second sentence of Rule 15(c) does not apply. However, for purposes of Rule 15(c), "an amendment to 'correct a misnomer or misdescription of a defendant' changes a

party within the meaning of the rule." Schiavone v. Fortune, 750 F.2d 15, 17 (3d Cir. 1984), aff'd 477 U.S. 21 (1986); but see, Dandrea v. Malsbary Manufacturing Co., 839 F.2d 163 (3d Cir. 1988) (changing the name of a corporation to reflect its new name is not changing a party for purposes of Rule 15(c)), and Beyda v. USAIR, Inc., 697 F.Supp. 1394 (W.D.Pa. 1988) (changing caption to reflect a defendant's true first and middle names is not changing a party for purposes of Rule 15(c)). Thus, the test to be applied in this case is that set forth in the second sentence of Rule 15(c) relating to amendments changing a party.

Defendant relies on the case of Schiavone v. Fortune, 477 U.S. 21 (1986), for the proposition that Amy Anne Marco

may not now be brought within the jurisdiction of this court by service of process since the statute of limitations has expired. In that case, the Supreme Court interpreted Rule 15(c) as requiring that, where relation back of an amendment naming a new party is sought, that four factors be satisfied:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and

third requirements must have been fulfilled within the prescribed limitations period.

Id., at 29. The first part of the test is satisfied in this case. A hearing was conducted with regard to the second through fourth requirements, as this court saw the need for evidentiary development. It is clear in this case that Amy Anne Marco had no notice of the filing of the action and, necessarily, was not made aware of any mistake with regard to her identity on the part of plaintiff, until after the statute had run.

"We hold that rule 15(c) requires notice of the actual 'institution of the action' and not mere notice that an action 'might ensue.'" Schiavone v.

Fortune, 750 F.2d 15, 18 (3d Cir. 1984, aff'd 477 U.S. 21 (1986); See, Bechtel v. Robinson, 886 F.2d 644 (3d Cir. 1989) (notice of the institution of the action for purposes of Rule 15(c) does not mean notice of the event giving rise to the cause of action). However, it would seem to be sufficient for purposes of Rule 15(c) if defendant had any knowledge of the filling of the complaint. Mitchell v. Hendricks, 65 F.R.D. 564 (E.D.Pa. 1975) (informal, as well as formal, notice is sufficient); Tretter v. Johns-Mansville Corp., 88 F.R.D. 329 (D.C. Mo. 1980) (notice of suit need not be formal for purposes of relation back, rather, it is sufficient if the defendant heard of the filing of the lawsuit); Senger v. Soo Line R.R. Co., 493 F.Supp. 143 (D.C.Minn.

1980) (notice received from outside the pleadings is sufficient for relation-back purposes). Some courts have also found constructive notice to be sufficient. Taliferro v. Costello, 467 F.Supp. 33 (E.D.Pa. 1979) (constructive notice is sufficient); see also, Kirk v. Cronvich, 629 F.2d 404 (5th Cir. 1980) (service of the original complaint on an agent of the defendant is adequate notice for determining if an amendment relates back)

Defendant has produced affidavits from the insurance company to the effect that copies of the complaint were not received by the insurance company until after the statute of limitations had run. Plaintiff does not contest these affidavits. Amy Anne Marco has been deposed, and has testified that she had no notice of the filing of the complaint

until well after the limitations period expired. Likewise, the attempted service of the complaint at her parents' home occurred after the period expired. Thus, Amy Anne Marco had neither actual nor constructive notice in this case of the filing of the complaint within the limitations period, and relation back pursuant to Rule 15(c) must be denied.

Plaintiff asserts, however, that Pennsylvania law, rather than Rule 15(c), should apply in this diversity action to the application of the statute of limitations.[2] Walker v. Armco Steel

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2. The court in Schiavone, supra, 750 F.2d at 18-19, when faced with the question of whether Rule 15(c) or New Jersey law should apply, chose not to address the issue in depth since the plaintiff in Schiavone had conceded in the district court that the New

Corp., 446 U.S. 740 (1980). Indeed, as a general matter, state law regarding limitations periods should control in a diversity case. However, the Walker court carefully explained that, when the application of a federal rule is in question and "the scope of the federal Rule in fact is sufficiently broad to control the issue before the Court," then the analysis from Hanna v. Plumer, 380 U.S. 460 (1965), must be applied. Walker, supra, at 749 - 750. Hanna requires that, when a federal rule is clearly applicable, it must first be determined whether there is a direct conflict between the state law and federal rule, and, if so, whether the federal rule, as applied, would be outside the Rules Enabling Act and the

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Jersey rule was procedural only.

authority of Congress under the Constitution. Id. Thus, for plaintiff to successfully challenge the application of Rule 15(c) in this diversity action, she must first establish that there is a direct conflict between the application of Rule 15(c) and the application of state law in this case.

Plaintiff asserts that, under Pennsylvania law, she would be permitted to amend the complaint to reflect the true name of the defendant she intended to sue. She further asserts that, having done so, the failure to serve Amy Anne Marco with the complaint is excusable under the rule set forth in Lamp v. Heyman, 469 Pa. 465, 366 A.2d 882 (1976). In that case, it was held that the filing of a suit would toll the statute of

limitations even if service is not effectuated timely where good-faith efforts are made to notify defendant. The Lamp case and its progeny are, however, relevant in this case, if at all, secondarily. The Lamp rule plainly contemplates that the complaint has named the proper party as defendant. If this were not so, then there would be no need for rules in Pennsylvania regarding relation back of amended complaints where a new party is added. Indeed, there are such cases, and the seminal case in this area is Saracina v. Cotoia, 417 Pa. 80, 208 A.2d 764 (1965). Therefore, only if it is determined that plaintiff may amend the complaint to include the name of "Amy Anne Marco" would the Lamp issues of service and good faith to serve become relevant.

In Saracina, the plaintiff was struck by an automobile operated by Robert Cotoia, but filed a complaint against Robert's father, Anthony Cotoia, the owner of the automobile. After the statute had run, plaintiff attempted to amend the complaint to change the name of the defendant from Anthony Cotoia to Robert Cotoia. The court held that, regardless of whether the plaintiff intended to sue Robert, he in fact sued Anthony, and, therefore, the amendment would add a party to the action after the running of the statute, and should not be allowed. A similar situation in DeRugeriis v. Brener, 237 Pa. Super 177, 348 A.2d 139 (1975), yielded a different result. There, the plaintiff again sued the father/owner rather than the

son/operator of the automobile in question. In that case, however, an amendment was allowed after the running of the statute since the father and the insurance carrier had actively misled the plaintiff as to the identity of the operator of the automobile. See also, Peaceman v. Tedesco, 51 Pa. Cmwlth. 544, 414 A.2d 1119, 1122 (1980) (statute of limitations may be tolled where there is active concealment of the true name of the person intended to be sued occurring during the period when the statute was running); Cianchetti v. Kaylen, 241 Pa. Super. 437, 361 A.2d 842 (1976) (insurance company, in dealings with plaintiff prior to filing of complaint against "Harry J. Kaylen," misled plaintiff into believing that that was a proper designation for intended defendant

"Henry J. Kaylen"). In this case, plaintiff was made aware of the name of the intended defendant in the police report, and, in fact, has argued that the mistake in this case was due to a misreading of the police report by either plaintiff's counsel, or his secretary. Further, affidavits have been provided by defendant which aver that the complaint was not received by the insurer until after the statute had run. Likewise, attempts to serve the complaint at Amy Anne Marco's parents' house, which were refused, occurred after the statute had expired, as did all communications between counsel.[3] There is no support

[3]. Plaintiff's counsel himself took the stand at the hearing held in this matter and set forth in detail his dealings with Peter Darragh, Esquire, who was contacted by the insurance

in the record for a conclusion that any misleading conduct on defendant's part occurred prior to the expiration of the statute. Therefore, under Pennsylvania law, plaintiff would be denied the opportunity to amend. There being no conflict between Rule 15(c) and Pennsylvania law in this case, the

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carrier after the carrier received the complaint, and who entered his appearance for "Anne F. Marco." None of the actions of Mr. Darragh may be said to impact the Rule 15(c) analysis, or the state law analysis, since they all occurred after the limitations period had already expired. Compare, Peaceman v. Tedesco, supra, (actions of defense counsel during limitations period could be seen as concealing fact that wrong party had been sued).

federal rule will apply. Hanna, supra.

Wherefore, on the basis of the foregoing, it is respectfully recommended that defendant's motion to dismiss be granted.

KENNETH J. BENSON
UNITED STATES
MAGISTRATE JUDGE

DATED: JUNE 4, 1991

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v.:	Civil Action No.90-753
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Defendant	BENSON

MEMORANDUM

This is a diversity action commenced by an Ohio resident against a resident of Pennsylvania for damages arising out of an automobile accident which occurred on May 8, 1988. The accident involved the plaintiff, Genevieve Dunn, and Amy Anne

Marco. The complaint, however, was filed on May 3, 1990, against "Anne F. Marco." Plaintiff attempted service on May 14, 1990 on "Anne F. Marco" at the address provided by Amy Anne Marco in the police report, but service was refused as that name was "unknown" at that address. Service was also refused on May 24, 1990, at the same address, to "Miss Ann Marco," again on the basis that she was "unknown at this address." A motion to dismiss has been filed on behalf of Anne F. Marco on the basis that proper service has not been effectuated. Dunn has now filed an amended complaint naming Amy Anne Marco as the proper party, and asserting that the original complaint contained a mistake regarding the defendant's name. Defendant's counsel, although nominally

representing Anne F. Marco, is, for purposes of this motion to dismiss, representing Amy Anne Marco and asserts that she may not now be served with process because the statute of limitations has run.[1]

The issue presented by the facts of this case is whether plaintiff should be permitted at this time to amend the complaint to reflect defendant's true name, and whether that amendment should "relate back" under Rule 15(c) to the filing of the complaint. If the amendment is permitted, but is not found to relate back to May 3, 1990 filing of the complaint, then the action against Amy Anne Marco will be time-barred.

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1. The parties agree that the applicable statute of limitations is two years from the date of occurrence, or until May 8, 1990.

As a general matter, a ruling on a motion to amend pleadings is left to the sound discretion of the district court, Coventry v. U.S. Steel Corp., 856 F.2d 514 (3d Cir. 1988), and such leave should be freely given when justice requires. Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208 (3d Cir. 1984). The resolution of the specific issue in this case, however, is dependent upon the application of the test set forth in Rule 15(c):

> **(c) Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment

relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintained his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Plaintiff asserts, and it is painfully

obvious in this case, that the naming of Anne F. Marco as defendant is a misnomer, and not a mistake regarding the defendant's identity. Plaintiff therefore asserts that the test set forth in the second sentence of Rule 15(c) does not apply. However, for purposes of Rule 15(c), "an amendment to 'correct a misnomer or misdescription of a defendant' changes a party within the meaning of the rule." Schiavone v. Fortune, 750 F.2d 15, 17 (3d Cir. 1984), aff'd 477 U.S. 21 (1986); but see, Dandrea v. Malsbary Manufacturing Co., 839 F.2d 163 (3d Cir. 1988) (changing the name of a corporation to reflect its new name is not changing a party for purposes of Rule 15(c)), and Beyda v. USAIR, Inc., 697 F.Supp. 1394 (W.D.Pa. 1988) (changing caption to reflect a defendant's true

first and middle names is not changing a party for purposes of Rule 15(c)). Thus, in light of the unequivocal statement of the law contained in Schiavone, the test to be applied in this case is that set forth in the second sentence of Rule 15(c) relating to amendments changing a party.

Defendant relies on Schiavone v. Fortune, 477 U.S. 21 (1986), for the proposition that Amy Anne Marco may not now be brought within the jurisdiction of this court by service of process since the statute of limitations has expired. In that case, the Supreme Court interpreted Rule 15(c) as requiring that, where relation back of an amendment naming a new party is sought, four factors be satisfied:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Id., at 29. The first part of the test is clearly satisfied in this case. It is with regard to the second through fourth requirements that there is need for evidentiary development.

In this case, plaintiff has asserted that her attorneys have been in constant contact with Amy Anne Marco's insurance carrier concerning the accident since almost the day it occurred, and also that Marco's insurance carrier received a copy of the complaint prior to May 8, 1990. Although service of the complaint was refused on May 14, 1990, defendant's attorney entered his appearance on May 17, 1990, generally, on behalf of Anne F. Marco.

The Schiavone court, although holding that notice to the party is required, did not determine what type of notice to the party is required, did not determine what type of notice will be sufficient. See, Honeycutt v. Long, 861 F.2d 1346, 1350 (5th Cir. 1988). That issue was addressed by the Third Circuit in its

treatment of the Schiavone case. "We hold that rule 15(c) requires notice of the actual 'institution of the action' and not mere notice that an action 'might ensue.'" Schiavone v. Fortune, 750 F.2d 15, 18 (3d. Cir. 1984), aff'd 477 U.S. 21 (1986); See, Bechtel v. Robinson, 886 F.2d 644 (3d Cir. 1989) (notice of the institution of the action for purposes of Rule 15(c) does not mean mere notice of the event giving rise to the cause of action). However, it would seem to be sufficient for purposes of Rule 15(c) if defendant had any knowledge of the filing of the complaint. Mitchell v. Hendricks, 68 F.R.D. 564 (E.D.Pa. 1975) (informal, as well as formal, notice is sufficient); Tretter v. Johns-Mansville Corp., 88 F.R.D. 329 (D.C.Mo. 1980) (notice of suit

need not be formal for purposes of relation back, rather, it is sufficient if the defendant heard of the filing of the lawsuit); Senger v. Soo Line R.R. Co., 493 F. Supp 143 (D.C. Minn. 1980) (notice received from outside the pleadings is sufficient for relation back purposes). Some courts have also found constructive notice to be sufficient. Taliferro v. Costello, 467 F.Supp. 33 (E.D.Pa. 1979) (constructive notice is sufficient); see also, Kirk v. Cronvich, 629 F. 2d 404 (5th Cir. 1980) (service of the original complaint on an agent of the defendant is adequate notice for determining if an amendment relates back).

Plaintiff has alleged that Amy Anne Marco may have received notice from her insurer, prior to the expiration of the

statutory period, that the complaint had been filed since the insurer received a copy of the complaint prior to May 8, 1990. If this is the case, then plaintiff has raised at least a colorable claim of adequate notice under Rule 15(c). Therefore, in light of these allegations, and the lack of any record upon which to base a finding regarding whether the insurance company received the complaint, or gave Amy Anne Marco notice of the filing of the complaint, a hearing is necessary to develop a record sufficient to support such a ruling.

Contemporaneous with this memorandum, an order will be issued scheduling an evidentiary hearing on this matter, limited in its scope to facts surrounding the issue of whether Amy Anne Marco was

given any notice, formal, informal, or constructive, of the filing of the complaint prior to May 8, 1990. If some type of notice is found to have occurred, argument will also be welcome concerning the effectiveness of such notice for purposes of the relation back requirements of Rule 15(c).

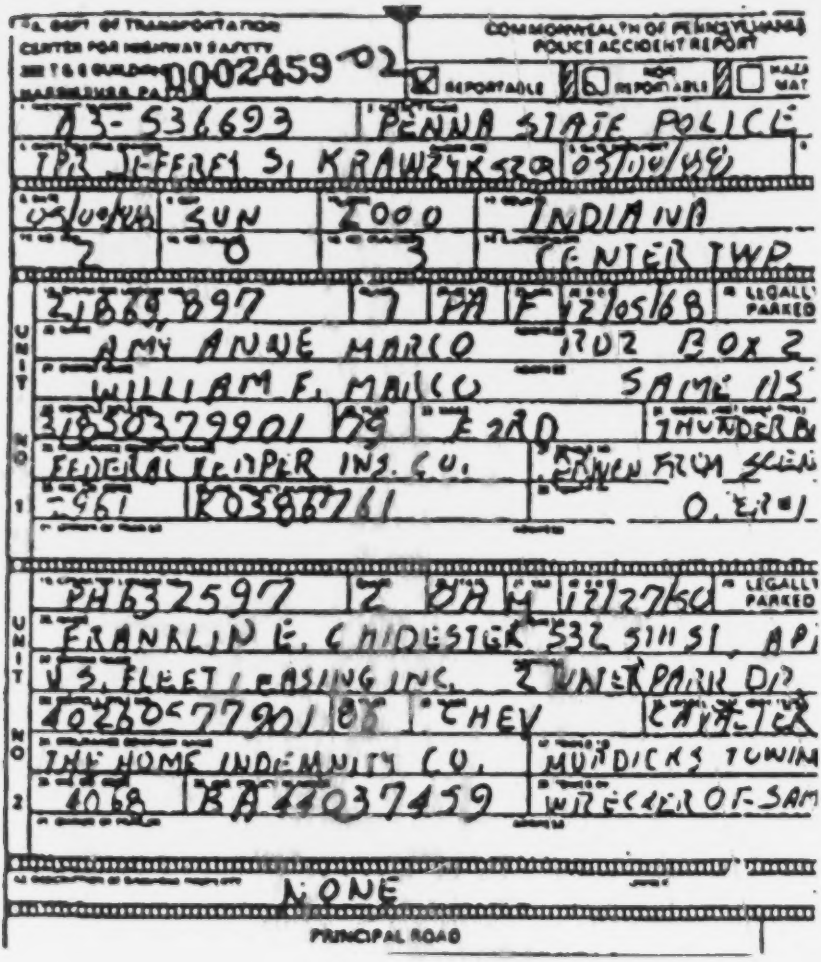
As a final note, the burdens of production and of proof at the hearing on this matter will be placed upon the Plaintiff. Although it would be anticipated that the moving party, here the defendant, would shoulder those burdens, the underlying question here is whether Amy Anne Marco received such notice of the filing of an action against her that service of process may be seen to relate back to the filing of the complaint. In other words, defendant has

raised a colorable claim questioning this court's jurisdiction over her, and it is this writer's belief that the plaintiff must now go forward and demonstrate that she has been properly haled into court. However, as was discussed in the conference held in this matter on September 20, 1990, suggestions regarding the scope of the proceeding and any other matter of concern to counsel will certainly be entertained.

KENNETH J. BENSON
UNITED STATES
MAGISTRATE

Excerpt from Commonwealth of Pennsylvania

Police Accident Report dated May 8, 1988



PROOF OF SERVICE

I, David W. Knauer, Esquire hereby certify that in accordance with Rule 29.3 I have this 26th day of May, 1992 deposited in the United States mail first class, postage paid, three copies of Plaintiff's Petition for Writ of Certiorari addressed to Defendant's counsel at his last known address to wit:

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